



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

TRG
Docket No: 4227-97
16 December 1999

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 7 December 1999. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinion furnished by the Judge Advocate Division of Headquarters Marine Corps dated 25 May 1999, a copy of which is enclosed and your rebuttal thereto dated 31 August 1999.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you reenlisted on 1 March 1989 while serving as a recruiter. Apparently on that same date, you received nonjudicial punishment (NJP) of a \$300 forfeiture for improperly obtaining telephone services. You apparently did not appeal this NJP. Evidence now of record does not disclose the facts and circumstances surrounding the NJP. However, it appears from your submissions that the telephone calls at issue may have been made to Ms. LeeAnne H, a member of the Delayed Entry Program (DEP) pool.

On 7 April 1989 you received a fitness report for the period 1 January to 28 March 1989 which assigned a mark of unsatisfactory in block 14g, judgment. In the comments section of the report, the reporting senior stated that you had been "released from duties as a ... recruiter for extremely poor judgment in relationships dealing with members of his (DEP)." In a statement of 19 April 1989 to that fitness report, you said that "in regards to the mark of unsatisfactory in 14g ... I feel I

received this mark from one episode involving one individual of the (DEP)."

On 12 April 1989 you received a second NJP of forfeitures totaling \$1,000 and a letter of reprimand for willful disobedience of a lawful order by engaging in, soliciting or otherwise seeking a nonprofessional relationship with a member of the DEP. It appears that the evidence against you consisted primarily of statements from [REDACTED], the individual with whom you allegedly sought the improper relationship; [REDACTED] sister; [REDACTED], [REDACTED]'s sister-in-law; and PVT L, another member of the DEP at the time of the alleged offenses. Again, you did not appeal the NJP.

In a fitness report of 1 August 1989, for the period 29 March to 1 August 1989, the reporting senior noted the second NJP and the punishment imposed. In your statement accompanying the report, you said that "during this period, I have exercised quality judgment by having nothing to do with any member of the (DEP) ..."

In 1994 you applied to the Board requesting the removal of the two NJP's and fitness reports. At that time, you submitted statements from [REDACTED] and PVT (then SGT) L in which they recanted their earlier accusations against you. An advisory opinion from the Staff Judge Advocate to the Commandant of the Marine Corps recommended denial of your application, in part, because "the most persuasive evidence that (you) engaged in an improper relationship with a (DEP) poolee was the statement submitted by the poolee, Ms. LeeAnne (H)." Ms. (H) has not recanted her statement recounting the details of her relationship with (you) ..." On 21 February 1996 the Board denied your application, noting, in part, that Ms. H "has not retracted her statement."

In June 1997, a request for reconsideration from your counsel was granted because of the following statement of 24 April 1997 from LeeAnne H:

I wrote the (original) statement (against you) because I wanted to get out of the Delayed Entry Program. My fiancée at the time, (now my ex-husband) gave me the idea that if we said these things about (you) then I would be able to get out of the Program and he would probably get shipped off somewhere else and we would have no problem carrying on with our lives.

I would like to now make a correction and let everyone know that my statement was untrue. In my statement, I said that we had a very intense

relationship, that is not the fact. (You were) acting as my recruiter and my friend and nothing more. He was there to counsel and help. He called every now and then to make sure that things were going all right. When he was in town he would stop by and say Hi to my grandmother (they were close). That was the extent of his visits I moved to Wenatchee with my sister and met a guy after I had enlisted and we decided that we wanted to get married. He told me that I needed to get out of the Delayed Entry Program and he told me how I could do it. That is when I started making all of my accusations.

I am coming forward now to try and set things right and save a man's career that I destroyed many years ago. I now live in another state far away from Washington and I am remarried, I have two wonderful children and my own business. I believe that I am trying to raise my children with high morale standards and to be honest. I can not do that when I have been dishonest as I have been in the past. If I had known that my actions back then would have caused so many problems over the years for (you) I would have never done it.

The advisory opinion of 25 May 1999 states, in part, as follows:

.... (Ms H's) recantation, almost eight years after the subject NJP and only after a conversation with Petitioner's counsel is suspect. As in our previous opinion, we find this recent change of heart to be of dubious merit, and insufficient to disturb the findings of the NJP authority in 1989.

In his rebuttal to the advisory opinion counsel states, in part, as follows:

.... The author of the advisory opinion states that Ms. H's recantation, which occurred "only after a conversation with Petitioner's counsel is suspect." No ground(s) for this statement is asserted. The unstated but clearly suggested basis is that counsel may have improperly induced this statement from Miss H. While insulting to counsel, it is more important to note that the Advisory Opinion offers no evidence upon which to support their opinion. In the opinion of a Marine Lieutenant Colonel, he finds Ms. H's statement "to be of dubious merit" without offering any evidence to support the opinion.

The advisory opinion fails to address the

statement of Sergeant L. It takes much courage for a Sergeant to accuse a Sergeant Major of procuring false testimony. Yet, the advisory opinion is curiously silent concerning this evidence - or concerning the evidence supporting SGT L's statement provided by [REDACTED] SGT L's statement and that of Penny H support and corroborate the recantation by [REDACTED] H. Thus, Ms. H's statement is fully corroborated by evidence of record in the case file.

In short, all of the evidence which was offered against SSGT G in his NJPs was fabricated. Every witness who provided testimony or whose testimony was recounted for the Commander by SGTMAJ F now has stated the testimony was false. Accordingly, the NJPs and adverse fitness reports that were occasioned by those NJPs are based on false and perjured evidence. As a matter of law, there now is no evidence which tends to support the validity of these actions. Whatever presumption of regularity may have once attached to these actions has been destroyed by the very witnesses who now say that their testimony was the product of improper influence or inducements. Simply stated, the NJPs and fitness reports must be invalidated in order to correct this manifest error and injustice.

In reaching its decision, the Board initially noted that you have submitted nothing to show that the NJP of 1 March 1989 was improper or unjust except your unsubstantiated contentions. Accordingly, the Board concluded there is no basis for its removal.

Turning to the NJP of 12 July 1999, the Board carefully considered the earlier recantations of SGT L and [REDACTED] and the most recent recantation of [REDACTED]. However, the Board views recantation, made long after the fact, with great suspicion. Since they are often the product of a receding memory and sympathy for the individual than a clearer recollection of the facts. Additionally, the Board noted all three individuals indicate that their original statements were due, in part, to pressure from a master sergeant at your command. The Board found it difficult to believe that a senior noncommissioned officer would pressure three individuals to lie about another member of the command. Moreover, the original statements by these three individuals were credible and detailed. Finally, it is clear that these three individuals lied about your actions at some point, but the Board cannot conclude with any degree of certainty that they were lying then as opposed to lying now. Your counsel's statement to the effect that there is now no evidence supporting the NJP is wrong. [REDACTED] has not recanted her statement

against you. Further the Board noted your statement in the fitness report of 7 April 1989 in which you stated that the poor mark in judgment was based on one improper relationship with a member of the DEP, presumably [REDACTED]. You did not, however, otherwise take issue with the mark or the derogatory comments by denying any improper relationships with members of the DEP. In the later fitness report, you stated only that your subsequent relationships with poolees were proper. Finally, the Board noted that you did not appeal the NJP and concluded that had you felt that the NJP was erroneous, you would have done so.

In reaching its decision the Board noted that the NJP evidence has been destroyed and it cannot now be known if there was other evidence beside the three statements at issue to support the NJP. In addition, the record shows that you could have contested the case at a court-martial but decided not to do so. Finally, the comments you made in the adverse fitness reports could be construed as an admission of misconduct of some degree.

Accordingly, the Board substantially concurred with the comments in the advisory opinion, and your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

1070
JAM4
25 MAY 1999

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF [REDACTED]
[REDACTED] U.S. MARINE CORPS

Ref: (a) [REDACTED] memo 1070/JAM4 of 5 Jul 95
(b) [REDACTED] ltr of 30 May 97
(c) [REDACTED] ltr of 6 Jun 96
(d) Article 15, UCMJ

1. We are asked to revisit our previous opinion provided in reference (a) concerning the appropriateness of two nonjudicial punishments (NJPs) imposed upon Petitioner. Petitioner received NJP on 1 March 1989 for violating Article 134, UCMJ, by improperly using Government phone lines for personal calls, and on 12 July 1989 for violating Article 92, UCMJ, by engaging in an improper relationship with a Delayed Entry Program poolee, the former Ms. Leeanne Hedrich. In reference (b), Petitioner's counsel requests that BCNR reconsider its two previous denials (February and June 1996) of Petitioner's appeals of his original application for relief. Petitioner's counsel relies upon two additional letters he has obtained and submitted with reference (b) in support of his present request for reconsideration.

2. We again recommend that relief be denied. Our analysis follows.

3. Background

a. In August 1995, Petitioner applied to BCNR for relief seeking the removal of the two NJPs mentioned above and an accompanying fitness report. Petitioner submitted the supposed recantations of two witnesses whose previous statements were considered by the NJP authority before he imposed punishment upon Petitioner in July 1989. In reference (c), BCNR notes that it considered these statements, submitted some five years after the NJP and apparently after Petitioner contacted the witnesses, as well as a Marine Corps Performance Evaluation Review Board (PERB) advisory opinion, and reference (a), our previous advisory opinion. BCNR denied Petitioner's request for relief, and properly determined that the NJP should not be removed from Petitioner's record. BCNR agreed with our opinion in reference (a) that the recantations were of "dubious merit."

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF STAFF [REDACTED]
[REDACTED] 8

b. Reference (a) also stated that "The most persuasive evidence that Petitioner engaged in an improper relationship with a poolee was the statement submitted by the poolee, [REDACTED] [REDACTED] has not recanted her statement recounting the details of her relationship with Petitioner while he was serving as a Marine recruiter." To support Petitioner's present request for reconsideration, Petitioner's counsel has submitted and attached to reference (b) the supposed recantation of Ms. [REDACTED] and a character reference from Petitioner's former commanding officer.

4. Analysis

a. [REDACTED]'s recantation, almost eight years after the subject NJP and only after a conversation with Petitioner's counsel, is suspect. As in our previous opinion, we find this recent change of heart to be of dubious merit, and insufficient to disturb the findings of the NJP authority in 1989.

b. The additional character reference from Petitioner's former commanding officer, [REDACTED], U.S. Marine Corps, contains high praise for Petitioner, and recommends that BCNR grant Petitioner's requests for relief. The character reference does not, however, change our opinion nor does it have any effect on the validity of the subject NJP. We still believe the NJP meets all requirements imposed by reference (d), and find no reason to disturb the findings and punishment imposed by the NJP authority.

5. Conclusion. Accordingly, for the reasons set forth above, we recommend that relief be denied.

M. W. Fisher, Jr.

M. W. FISHER, JR
Head, Military Law Branch
Judge Advocate Division